No. 96-1769

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, *et al.*,

Petitioners,

—v.—

EUGENE WOODARD,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OHIO IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. OHIO'S LAW AND TRADITIONS HAVE CREATED A LIBERTY INTEREST IN FAIR CLEMENCY PROCEEDINGS THAT IS PROTECTED BY THE DUE PROCESS CLAUSE 5

A. Ohio Clemency Law And Tradition 6

B. The APA's New Clemency Policy Deprives Woodard Not Merely Of Procedure For Its Own Sake, But Of Real And Substantial Interests In Seeking Clemency, In Having A Thorough Investigation Conducted In His Case, And In Having A Report And Recommendation Made To The Governor By The APA 11

Page

II. OUR NATION'S HISTORY, LEGAL TRADITIONS, AND PRACTICES DEMONSTRATE THAT RESPONDENT HAS A SUBSTANTIVE DUE PROCESS RIGHT TO PURSUE CLEMENCY, ARISING FROM THE FOURTEENTH AMENDMENT ITSELF, WHICH MANDATES RUDIMENTARY FAIRNESS IN THE CLEMENCY PROCESS 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Albright v. Oliver,
510 U.S. 266 (1994) 20

Beck v. Alabama,
447 U.S. 625 (1980) 14

Biddle v. Perovich,
274 U.S. 480 (1927) 23

Board of Pardons v. Allen,
482 U.S. 369 (1987) 13

Collins v. Harker Heights,
503 U.S. 115 (1992) 20

Connecticut Bd. of Pardons v. Dumschat,
452 U.S. 458 (1981) 4, 12, 13, 14

Del A. v. Roemer,
777 F.Supp 1297 (E.D.La. 1991) 16

Douglas v. California,
372 U.S. 353 (1963) 20

Evitts v. Lucey,
469 U.S. 387 (1985) 16, 17

Felker v. Turpin,
518 U.S. __, 116 S.Ct. 2333 (1996) 19

Fetterly v. Paskett,
15 F.3d 1472 (9th Cir.),
cert. denied, 513 U.S. 914 (1994) 17

Ford v. Wainwright,
477 U.S. 399 (1986) 20, 21

Page

Greenholtz v. Nebraska Penal Inmates,
442 U.S. 1 (1979) 13

Gregg v. Georgia,
428 U.S. 123 (1976) 19

Herrera v. Collins,
506 U.S. 390 (1993) 5, 11, 17, 18, 19, 22

In re Sapp,
118 F.3d 460 (6th Cir.),
cert. denied,
__ U.S. __, 117 S.Ct. 2536 (1997) 10

Masson v. New Yorker Magazine,
501 U.S. 496 (1991) 4

Olim v. Wakinekona,
461 U.S. 238 (1983) 14, 15

Otey v. Stenberg,
34 F.3d 635 (8th Cir. 1994) 22

Palko v. Connecticut,
302 U.S. 319 (1937) 5, 20

Roberts v. Louisiana,
428 U.S. 325 (1976) 23

Rochin v. California,
342 U.S. 165 (1952) 20

Sandin v. Conner,
515 U.S. __,
115 S.Ct. 2293 (1995) 15

Santosky v. Kramer,
455 U.S. 745 (1982) 20

Page

Snyder v. Massachusetts,
291 U.S. 97 (1934) 20

Stanford v. Kentucky,
492 U.S. 361 (1989) 19

State ex rel. Maurer v. Sheward,
644 N.E.2d 369 (Ohio 1994) . . . . . *passim*

State v. Woodard,
623 N.E.2d 75 (1993),
cert. denied, 512 U.S. 1246 (1994) 2

Sun Oil Co. v. Wortman,
486 U.S. 717 (1988) 15

Wainwright v. Brownlee,
103 F.3d 708 (8th Cir. 1997) 22

Washington v. Glucksberg,
__ U.S. __, 117 S.Ct. 2258 (1997) 18

Wolff v. McDonnell,
418 U.S. 539 (1974) 15

Woodson v. North Carolina,
428 U.S. 280 (1976) 21

Woratzeck v. Arizona Bd. of Executive Clemency,
117 F.3d 400 (9th Cir. 1997) 22

States Constitutions and Statutes

Conn. Gen. Stat. §18-26 (1981) 13

OHIO CONST. art. II, §5 (1802) 6

OHIO CONST. art. III, §11 (1852) 7

Page

OHIO CONST. art. III, §11 (1852)
(as amended Jan. 1, 1996). 1, 2, 7

Ohio Rev. Code §2967.03 (Anderson 1996) 2

Ohio Rev. Code §2967.07 (Anderson 1996) 1, 8, 10

Ohio Rev. Code §2967.12 (Anderson 1996) 2

Legislative History

BIENNIAL REPORTS OF THE OHIO PARDON AND PAROLE COMMISSION OF PARDONS, COMMUTATIONS, AND REPRIEVES 7

126 OHIO SENATE JOURNAL 7

127 OHIO SENATE JOURNAL 8

128 OHIO SENATE JOURNAL 8

129 OHIO SENATE JOURNAL 8

130 OHIO SENATE JOURNAL 8

131 OHIO SENATE JOURNAL 8

Other Authorities

4 WILLIAM BLACKSTONE, COMMENTARIES *390 18

THE FEDERALIST No. 74
(A. Hamilton)(C. Rossiter, ed. 1961) 18

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Ohio is one of its statewide affiliates. The ACLU has participated in numerous death penalty cases before this Court and has long taken the position that the state must scrupulously obey due process requirements when it seeks to impose the death penalty. The outcome of this case is, therefore, a matter of great concern to the ACLU and its members.

STATEMENT OF THE CASE

Under the Ohio constitution, the governor has authority to grant clemency; the clemency process, however, is subject to legislative regulation. OHIO CONST. art. III, §11. The General Assembly has exercised that authority by enacting a comprehensive statutory scheme designed to assure that the governor's clemency decisions are well-informed. In particular, Ohio law requires that the Adult Parole Authority (APA) conduct a "thorough investigation" of whether clemency is warranted, and issue a written report and recommendation to the governor. Ohio Rev. Code §2967.07 (Anderson 1996).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The APA may recommend clemency if "such action would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev. Code §2967.03 (Anderson 1996). Prior to recommending clemency, the APA must notify the prosecuting attorney and trial judge in the sentencing jurisdiction, as well as the victim's representative, of the pendency of clemency. Ohio Rev. Code §2967.12 (Anderson 1996). The failure of the APA to fulfill its duties invalidates any pardon or commutation issued by the governor. *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994); OHIO CONST. art. III, §11 (as amended Jan. 1, 1996).

Eugene Woodard was convicted of murder in Ohio and sentenced to death. His conviction and sentence were affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. *State v. Woodard*, 623 N.E.2d 75 (1993), *cert. denied*, 512 U.S. 1246 (1994). He was originally scheduled to die on October 7, 1994. On August 24, 1994, the Ohio Supreme Court stayed the execution date so that Woodard could pursue post-conviction relief.

Two weeks later, Woodard was notified by the APA that a clemency hearing had been set for September 16, 1994, then only ten days away. At the same time, Woodard was informed that he had a right to request a pre-hearing interview with the APA, which would be held three days later on September 9, 1994. Through newly appointed counsel, Woodard objected to the short notice. Woodard's counsel also requested the right to attend and participate in both the hearing and interview to assure that the conduct of the clemency proceedings did not prejudice Woodard's pending application for post-conviction relief.

When his request was not granted, Woodard brought suit under 42 U.S.C. §1983, challenging the constitutionality

of the APA's clemency procedures.[2] Those procedures are based, in part, on regulations adopted by Ohio's Department of Rehabilitation and Correction in July, 1994.[3] Among other things, the regulations provide that the APA must schedule a clemency review 45 days prior to any execution. An inmate is then barred from seeking a subsequent clemency hearing without leave of the APA. In this case, Woodard's execution was stayed by the Ohio Supreme Court within the 45 day period. As a result, the clemency review and the application for post-conviction relief were scheduled to proceed simultaneously. In addition, the regulations prohibit the presence of counsel at any pre-hearing interview conducted by the APA even when (as here) there is ongoing litigation, and even though the inmate's uncounseled statement can then be used against him at the clemency hearing. Finally, the APA's procedures bar the introduction of any documentary evidence or testimony at the clemency hearing other than whatever uncounseled statement the inmate may have given at his pre-hearing interview.[4]

Adopting the recommendation of the Magistrate Judge, the district court granted the APA's motion for judgment on the pleadings. The Sixth Circuit reversed on two grounds. First, it rejected the lower court's conclusion that the APA's procedures were immune from scrutiny under the Due Process Clause. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997). Second, it held that dismissal on the pleadings was improper because the APA's procedure

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[2] He also sought a temporary restraining order. Notwithstanding its earlier position to the contrary, the APA agreed to postpone the clemency proceedings indefinitely once the §1983 suit was filed.

[3] *See Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1195 (6th Cir. 1997)(Nelson, J., concurring in part and dissenting in part).

[4] *See* Complaint at ¶10.

may have burdened Woodard's Fifth Amendment privilege against self-incrimination by imposing an unconstitutional condition on his participation in an uncounseled clemency interview. *Id.* at 1189-91. The Sixth Circuit then remanded the case to the district court on both claims for the development of a factual record. Rather than return to the district court, the APA sought *certiorari*. Accordingly, the case comes before this Court only on the pleadings, and the allegations contained in those pleadings must be accepted as true. *See, e.g., Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

SUMMARY OF ARGUMENT

As a matter of law and tradition, the State of Ohio has long insisted that the governor's exercise of clemency must be preceded by a "thorough investigation." Since 1965, the responsibility for conducting that investigation has rested with the Ohio Adult Parole Authority.

The obligation to conduct a "thorough investigation" is a mandatory one under Ohio law. Especially in a death penalty context, this statutory entitlement is more than sufficient to trigger the protections of the Due Process Clause under this Court's well-established precedents. It also distinguishes this case from *Connecticut Bd. of Pardons v. Dumschaut*, 452 U.S. 458 (1981). In *Dumschaut*, this Court emphasized that the clemency decision remained a discretionary one. Here, Woodard's due process claim does not depend on a right to receive clemency. Instead, it turns on the state-guaranteed right to a "thorough investigation" and meaningful consideration of Woodard's clemency application.

The right to fair clemency procedures is also protected by principles of substantive due process. As this Court has noted, every state that authorizes capital punishment also

authorizes clemency. *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Clemency has historically been seen as a necessary fail safe in capital cases, and is plainly part of our nation's legal tradition. *Id.* The notion that the fail-safe function of clemency is irreconcilable with arbitrary procedures does not require an expansive view of substantive due process. Rather, it reflects fundamental principles of justice at the core of the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).[5]

ARGUMENT

I. OHIO'S LAW AND TRADITIONS HAVE CREATED A LIBERTY INTEREST IN FAIR CLEMENCY PROCEEDINGS THAT IS PROTECTED BY THE DUE PROCESS CLAUSE

As the Sixth Circuit correctly noted and as petitioner concedes, a Fourteenth Amendment liberty interest can be derived from either state law or the Due Process Clause itself. 107 F.3d at 1183. In this case, the Sixth Circuit properly found a protected liberty interest under the Due Process Clause given the integral role that clemency plays in Ohio's overall scheme of death penalty adjudication. *See* pp.16-17, *supra*.

The Sixth Circuit did not, however, accept Woodard's contention that state law also gives rise to a protected liberty interest in fair clemency procedures.[6] *Amici* respectfully

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[5] Although this brief addresses only the due process issues, *amici* support Woodard's contention that the APA's clemency procedures unconstitutionally burden his Fifth Amendment rights.

[6] This may be attributable to the fact that neither the Sixth Circuit nor the district court had the benefit of discovery or an evidentiary record concerning Ohio's executive clemency practices in capital cases.

submit that the Sixth Circuit's rejection of a state-created liberty interest was erroneous, and provides an alternative ground for upholding the judgment below.

Ohio's constitution, statutes, and decisions impose mandatory limits on the discretion of the APA and the governor to grant pardons and commutations without conducting a thorough investigation into whether clemency is appropriate. Thus, under Ohio law and tradition, Woodard had a legitimate expectation that he would be afforded a reasonable opportunity to apply for clemency before being executed and that the APA would conduct a mandatory, thorough investigation of his case.

In ruling that no state-created liberty interest existed, the Sixth Circuit gave short shrift to the body of law designed to further Ohio's interest in assuring that the power to grant clemency is not exercised in an arbitrary fashion. In fact, Ohio has recently reaffirmed that interest in two dramatic and revealing ways. First, the Ohio Supreme Court invalidated a pardon issued by the governor because it did not comply with state-mandated procedures. *See* pp.9-10, *supra*. Second, the citizens of Ohio amended the constitutional provisions governing clemency to reemphasize the importance of procedural regularity. *See* pp.6-7, *supra*.

A. Ohio Clemency Law And Tradition

The Ohio Constitution of 1802, art. II, §5, like the United States Constitution, granted the executive plenary power over clemency.[7] In 1852, however, the clemency provisions of Ohio's constitution were modified and the clemency power of the governor was made "subject" to

[7] The Ohio Constitution of 1802 provided that the governor "shall have the power to grant reprieves and pardon, after conviction, except in cases of impeachment."

"such regulations as to the manner of applying for pardons, as may be prescribed by law." OHIO CONST. art. III, §11 (1852).[8] The purpose of this revision was to provide the Ohio General Assembly with the authority to regulate the pardon application process by "establish[ing] prerequisites to the Governor's exercise of the power to grant pardons." *State ex rel. Maurer v. Sheward*, 644 N.E.2d at 374.

For nearly 150 years, Ohio's constitutional provisions governing clemency remained unchanged. During this century and a half, Ohio's governors regularly employed the clemency power to commute capital sentences. For example, between 1953 and 1963 when Ohio had its last execution, Ohio's governors reported to the General Assembly that they had commuted the death sentences of at least 13 convicted murderers to life imprisonment, while 25 others were executed. *See* BIENNIAL REPORTS OF THE OHIO PAR-

[8] Article III, §11 of the Ohio Constitution of 1852 provided in full:

> [The Governor] shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor.

On November 7, 1995, this provision was amended by Ohio voters to force the governor to comply with regulations imposed by law as to the manner of applying for "commutations," as well as pardons. *Id.* (as amended Jan. 1, 1996).

DON AND PAROLE COMMISSION OF PARDONS, COMMUTATIONS, AND REPRIEVES (Biennial reports to General Assembly of cases in which Governors Lausche, Brown, O'Neill, DiSalle, and Rhodes granted clemency), *reprinted in* 126 OHIO SENATE JOURNAL 1542-47; 127 OHIO SENATE JOURNAL 1324-34; 128 OHIO SENATE JOURNAL 1470-75; 129 OHIO SENATE JOURNAL 1746-55; 130 OHIO SENATE JOURNAL 1809-16; 131 OHIO SENATE JOURNAL 1656-65.[9] In making these clemency decisions, Ohio's governors historically sought and relied on favorable recommendations from the Pardon and Parole Commission (predecessor of the APA). *E.g.*, Commutation of Lewis Niday (Nov. 23, 1959), reported in 129 OHIO SENATE JOURNAL 1747; Commutation of James Louis Long (Feb. 8, 1962), reported in 130 OHIO SENATE JOURNAL 1811.

Ohio reinstituted the death penalty in 1981, and the use of clemency in capital cases also resumed. By then, the Ohio legislature had codified the prior tradition of carefully investigating all clemency applications. Specifically, Ohio law has mandated since 1965 that the Adult Parole Authority must conduct "a thorough investigation into the propriety of granting" clemency in all cases and make a nonbinding recommendation to the governor.[10]

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[9] Absent the sort of discovery that Woodard sought in his lawsuit from the APA, it is difficult to ascertain the exact number of death sentences that have been remitted through clemency. The Biennial Reports sometimes omit information necessary to such a determination. However, every one of the referenced Biennial Reports recounts the commutation of one or more death sentences by the governor.

[10] Ohio Rev. Code §2967.07 provides (emphasis added):

> All applications for pardon, commutation of sentence, or reprieve *shall* be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the
>
> (continued...)

Any ambiguity about the meaning of this provision was authoritatively resolved by the Ohio Supreme Court in *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, when it invalidated an executive pardon granted by the governor before the APA was given an opportunity to conduct a "thorough investigation" and make a recommendation. At the same time, the *Maurer* court ruled that the absence of a "thorough investigation" did not limit the governor's ability to commute sentences because the 1852 state constitution granted the legislature regulatory authority over pardons but not commutations. The fact that Ohio's constitution was subsequently amended to stipulate that commutations are also subject to the legislature's regulatory authority, *see* n.8, *supra*, only underscores the state's commitment to procedural regularity whenever clemency is at stake.

The holding in *Maurer* provides strong support for Woodard's assertion that he has a liberty interest under Ohio law in making an application for clemency and receiving a thorough investigation of his request by the APA, followed by a written report and recommendation to the governor. The *Maurer* court construed Ohio law as breaking the clemency power into "two distinct elements -- the application process and the consideration process." *Id.* at 378. The application process extends to the time "just before" the governor reaches a clemency decision and includes "the filing of the application itself, the investigation, the recommendation, and the full report by the APA." *Id.* Although the governor

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[10] (...continued)

> governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve *shall* be made by the authority, which *shall* report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor [sic] and the records or minutes relating to the case.

has the final say over whether to grant or deny clemency, there must first be compliance with the application element, "which *requires the APA to investigate, recommend, and report before the Governor may grant a pardon.*" *Id.* (emphasis added).

According to the *Maurer* court, this mandatory application element is "meant to ensure that information about each person for whom a pardon is considered will be available to the Governor, so that an informed decision may be made." *Id.* In *Maurer* itself, the Ohio Supreme Court concluded that because Governor Celeste had granted the pardon in question before the APA had completed its thorough investigation, report, and recommendation, "the pardon purportedly granted was invalid from the outset." *Id.* at 379.

The combined effect of *Maurer*, the revised clemency provisions to the Ohio Constitution, Ohio Rev. Code Ann. §2967.07, and Ohio's historical capital clemency practice is to create a uniquely bifurcated clemency system. *See In re Sapp*, 118 F.3d 460, 465-66 (6th Cir.), *cert. denied*, __, U.S. __, 117 S.Ct. 2536 (1997)(rejecting a due process challenge to Kentucky's clemency system because Kentucky, unlike Ohio, "has not made the clemency process part of the state's overall adjudicative process"). Clemency in Ohio is comprised of a decisionmaking element that is discretionary and unfettered, and an investigatory-recommendation element that gives rise to Woodard's liberty interest because it is unequivocally mandatory, and binds both the APA and the governor. According to the Ohio Supreme Court:

> The General Assembly has chosen the word "all" to indicate that every request for a pardon *must go to the APA for evaluation.* In addition, the General Assembly has chosen to use the word "shall" in R.C. 2967.07 three times in connection with the APA's role in the pardon application process. *This indicates the mandatory nature of the APA investigation and of the entire APA involvement in the APA investigation process.*

Maurer, 644 N.E.2d at 378 (emphasis added).

B. The APA's New Clemency Policy Deprives Woodard Not Merely Of Procedure For Its Own Sake, But Of Real And Substantial Interests In Seeking Clemency, In Having A Thorough Investigation Conducted In His Case, And In Having A Report And Recommendation Made To The Governor By The APA

The failure of the APA to conduct a meaningful investigation in death penalty cases denies Woodard, and all other death row inmates in Ohio, real and substantial rights guaranteed by state law and protected by the Fourteenth Amendment. By denying Woodward a genuine opportunity to participate in the process, the APA's clemency procedures effectively deprive Woodward of meaningful access to clemency. Considering the crucial role that clemency has played in Ohio's unique system of capital punishment, the importance of having an unimpeded opportunity to apply for clemency and to receive a thorough investigation by the APA cannot be overstated. This Court recognized as much when it observed that "[c]lemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. at 411-12. Surely an administrative policy that radically curtails access to Ohio's historic remedy in capital cases, and that limits the scope of the mandatory investigation into whether clemency is deserved, has taken away an essential interest created by state law.

The state argues that, notwithstanding Ohio's body of clemency law, Woodard does not have a constitutionally cognizable liberty interest because no "substantive limitations" have been placed on the governor's clemency power. Relying on *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, the state contends that unless Woodard can show that he has a right to receive clemency under certain circumstances, the Due Process Clause has nothing to say about how Ohio dispenses clemency.

If Woodard were predicating his Fourteenth Amendment interest on the likelihood of receiving clemency, then presumably *Dumschat* would be relevant. However, unlike the prisoners whose claims were rejected in *Dumschat*, Woodard plainly is not contending that he has a right to due process because he has a reasonable likelihood of receiving clemency under state law. Rather, he is arguing that due process is triggered because Ohio law imposes on the APA a mandatory obligation to consider his application for clemency, thoroughly investigate his case, and convey a recommendation to the governor. *Dumschat* never considered this question and its reasoning is not appropriately extended to this case for several reasons.

First, *Dumschat* dealt with an attempt to impose procedural restraints on the ultimate decisionmaker in Connecticut's clemency scheme, the Board of Pardons, which had absolute discretion both as to whether and how clemency was granted.[11] In determining that Connecticut law did not

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[11] The Connecticut statute in question provided:

> (a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death (continued...)

create a protected liberty interest, this Court reasoned that the "commutation statute, having no definitions, no criteria, and no mandated 'shalls,' creates no . . . duty or constitutional entitlement." *Id.* at 466.

By contrast, Woodard does not challenge the "consideration" element carried out by the governor as ultimate decisionmaker, but the investigatory-recommendation element with which the APA is charged under Ohio law. *See State ex rel. Maurer v. Sheward*, 644 N.E.2d at 378. Unlike the Connecticut statute considered in *Dumschat*, Ohio's clemency statute repeatedly uses nondiscretionary language. *Maurer*, 644 N.E.2d at 378. In addition, the decision of the Ohio Supreme Court in *Maurer* employing judicial review to invalidate clemency decisions that are made without an APA investigation, report, and recommendation further suggests an intention to "cabin the discretion" of the clemency authorities. *See Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987). In that regard, Ohio's law is far more similar to the parole statute that gave rise to procedural protections in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), than to the Connecticut commutation statute in *Dumschaut*. Thus, Woodard's claim that he is entitled to meaningful access to clemency and an investigation and recommendation by the APA is not "simply a unilateral hope," but is firmly rooted in the mandatory "statutes or other rules

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[11] (...continued)

> shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

Conn. Gen. Stat. §18-26 (1981).

defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465.

Second, *Dumschat* dealt with the asserted liberty interests of prisoners who were merely seeking early release from serving noncapital sentences. *Id.* at 471 n.5. By contrast, Woodard is arguing that his death sentence should not be imposed at all. Because he is seeking to avert the imposition of capital punishment, Woodard has a qualitatively different interest in seeking clemency than the prisoners in *Dumschat*. *See Beck v. Alabama*, 447 U.S. 625 (1980)(holding that the Due Process Clause gives heightened procedural protections to capital defendants because of the greater need for reliability).

The state also argues that even if Ohio law does impose mandatory constraints on the APA, those requirements guarantee Woodard only "procedural" rights, not "substantive" rights. Relying primarily on *Olim v. Wakinekona*, 461 U.S. 238 (1983), the state contends that due process does not attach to what it describes as state-created "procedural" rights. *Olim*, however, held only that an administrative rule requiring a hearing prior to some prison transfers did not give the inmate a constitutionally protected "right" to a hearing that in turn triggered procedural protections. Justice Blackmun reasoned that if the decisionmaker can deny the requested relief for any constitutionally protected reason or for no reason at all, the state has not created a protected liberty interest. *Id.* at 249.

In the instant case the APA is not the final decisionmaker, only an advisory body charged with the mandatory task of conducting a "thorough investigation" of Woodard's clemency application and of making a report and recommendation to the governor. As the *Maurer* case established, the APA has no discretion in fulfilling these tasks, and thus stands in a different relation to Woodard than did the ad-

ministrator in *Olim* to that prisoner. The administrator in *Olim* had unfettered discretion to uphold the challenged prison transfer, which included presumably the ultimate say over the lesser decision of whether to convene a hearing to assist in making that decision. By contrast, the APA has no such discretion: its job is to investigate, report, and recommend, and it is this state-created expectation that gives rise to Woodard's Fourteenth Amendment interest. Contrary to the Sixth Circuit's view in this case, it is simply not true that the "only thing that counts is that there are 'no standards governing the [final decisionmaker's] exercise of his discretion.'" 107 F.3d at 1185, quoting *Olim v. Wakinekona*, 461 U.S. at 249-50.

Moreover, the state is simply wrong in contending that Ohio's statutory guarantees are "merely procedural" in the same sense that Hawaii's guarantee of a hearing prior to a discretionary transfer was procedural in *Olim*. As Justice Scalia has observed, "except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988). Within the context of discerning a state-created liberty interest, the purpose of the substance-procedure dichotomy is to distinguish between rights that are truly significant to the individual and those that are relatively less important. *Sandin v. Conner*, 515 U.S. __, __, 115 S.Ct. 2293, 2300 (1995)(state-created liberty interests are generally limited to freedom from deprivations that impose "atypical and significant hardship" on the individual). Under any reasonable definition, Woodard's interest in receiving the fair clemency proceedings that Ohio has promised him is an interest of "real substance." *Id.* at 2297, quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

Ohio law mandates that the APA conduct a thorough in-

vestigation of Woodard's clemency petition, and that it report on that application and make a recommendation to the governor on whether to spare Woodard's life. Especially when viewed in light of Ohio's history of regularly commuting the sentences of many on death row, these guarantees represent a substantial benefit to Woodard that fall squarely on the "substance" side of the dichotomy. *See Del A. v. Roemer*, 777 F.Supp 1297, 1321 (E.D. La.1991)(state requirement of mandatory investigation of abuse charges is a substantive benefit which gives rise to interest protected by procedural due process for children who are the objects of abuse).

The APA's clemency procedures prevent Woodard from contributing information vital to the complex balancing of factors that is required of the clemency decisionmaker, obviously decreasing his chances of receiving clemency. The state's contention that it has taken nothing of importance away from Woodard is belied by Ohio's statutes and constitution, the rulings of the Ohio Supreme Court, and the integral role that clemency has historically played in Ohio's imposition of the death penalty.

II. OUR NATION'S HISTORY, LEGAL TRADITIONS, AND PRACTICES DEMONSTRATE THAT RESPONDENT HAS A SUBSTANTIVE DUE PROCESS RIGHT TO PURSUE CLEMENCY, ARISING FROM THE FOURTEENTH AMENDMENT ITSELF, WHICH MANDATES RUDIMENTARY FAIRNESS IN THE CLEMENCY PROCESS

The Sixth Circuit in *Woodard*, relying on *Evitts v. Lucey*, 469 U.S. 387 (1985), recognized a due process right arising directly from the Fourteenth Amendment based on the "integral role" of clemency in Ohio's system of justice.

Because *amici* agree with the reasoning of the Sixth Circuit on this point, we will not rehash that thoughtful opinion here.[12] Instead, *amici* urge the Court to consider an additional, compelling basis for finding that the APA's clemency procedures deprived Woodard of a liberty interest arising directly out of the Due Process Clause. The unwavering history, legal traditions, and practice of this country establish that capital defendants have a substantive due process right to have access to clemency, and to be given meaningful consideration of their application prior to execution. This right in turn triggers the procedural protections of the Fourteenth Amendment that were violated in Woodard's case.

Woodard's claim is that Ohio has effectively denied him access to clemency by: (1) creating a procedure that does not allow him to have counsel present at his interview (a right afforded by the majority of states that impose the death penalty, *see* Brief of Respondent and statutes cited therein); (2) prohibiting him from presenting evidence in

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[12] Under the reasoning of *Evitts*, Ohio is not free to rely on the clemency process as an important part of its procedure for choosing between the punishment of life or death, and then to conduct that process without regard to fundamental fairness. Once a state has chosen a constitutionally valid approach to capital punishment, "it must stick to the script." *Fetterly v. Paskett*, 15 F.3d 1472, 1483 (9th Cir.), *cert. denied*, 513 U.S. 914 (1994). The state seeks to evade the holding in *Evitts* by asserting that clemency, unlike the discretionary appeal that triggered due process in *Evitts*, is not part of the "system for finally adjudicating the guilt or innocence of the defendant" -- clemency exists "in spite" of the defendant's guilt or innocence. Petitioner's Brief at pp.20-21. However, such an attempt to portray clemency as being outside of the capital punishment process contradicts this Court's recognition in *Herrera* that clemency has long served as the remedy "*for claims of innocence based on new evidence*, discovered too late in the day to file a new trial motion." *Herrera*, 506 U.S. at 417 (emphasis added).

support of clemency (the vast majority of death penalty states permit the introduction of evidence by the applicant, *id.*); (3) forcing him to choose between pursuing clemency and continuing to contest his conviction in the courts; and (4) prohibiting him from reapplying for clemency without leave of the APA (no other capital punishment state prohibits death row inmates from applying for clemency, *id.*).

When considering the existence of a substantive due process right, this Court has instructed that we begin by "examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, __ U.S. __, __, 117 S.Ct. 2258, 2262 (1997). Here, the teaching of history is clear -- clemency has always been considered an indispensable part of the death penalty process in this country.

Indeed, the broadly held view of clemency as an essential fail safe led the framers to include an explicit reference to clemency in the United States Constitution despite the notion of authorities like Blackstone, who believed that the pardoning power could not exist in democracies. 4 WILLIAM BLACKSTONE, COMMENTARIES *390 (asserting that the clemency power can never exist in democracies because in such a system, "nothing higher is acknowledged than the magistrate who administers the laws"). Alexander Hamilton, among others, argued that it was necessary to repose the clemency power in the president in the interests of "[h]umanity and good public policy." THE FEDERALIST No. 74, at 447 (A. Hamilton)(C. Rossiter, ed. 1961).

Throughout history, the states have also found clemency to be an essential part of their respective systems of justice. In *Herrera v. Collins*, 506 U.S. at 414, Chief Justice Rehnquist observed that clemency has been available in America since the founding of the British colonies and that today, every state that authorizes capital punishment has constitu-

tional or statutory provisions for clemency.[13] As the Court has noted, the most reliable indication of a national consensus regarding a practice is the pattern of enacted laws. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989).

This history, moreover, reflects more than tradition. Because criminal justice systems are inevitably fallible, clemency functions as a necessary fail safe intended to prevent the execution of the innocent. *Id.* at 415. The Court in *Herrera* noted that "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." *Id.* Justices Stewart, Powell, and Stevens acknowledged this essential function of clemency when they observed that a criminal justice system which provided for capital punishment without also including access to clemency "would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. 123, 199 n.50 (1976) (Stewart, Powell, and Stevens, JJ.).[14]

Woodard's claim that before he may be executed he is entitled to have a realistic chance to apply for clemency and

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[13] In context, the statement in *Herrera* that the Constitution does not "require the States to enact a clemency mechanism," 506 U.S. at 414, appears merely to describe the scope of the presidential clemency provisions in Article II. The Court in *Herrera* did not engage in any substantive due process analysis or otherwise consider whether clemency was required in capital cases under the Fourteenth Amendment's Due Process Clause. Indeed, the exposition of clemency law included in *Herrera* leads to the opposite conclusion.

[14] The importance of clemency as a "fail safe," especially in capital cases, has become even more critical given recently enacted congressional restrictions on habeas corpus. *See, e.g., Felker v. Turpin*, 518 U.S. __, 116 S.Ct. 2333 (1996).

to be given meaningful consideration thus falls squarely within the protections accorded by the Fourteenth Amendment. The constitutional interest he asserts is protected by the substantive provisions of the Due Process Clause because it is derived from considerations deeply rooted in "reason," "the judicial process," and "the compelling traditions of the legal profession." *Rochin v. California*, 342 U.S. 165, 170-71 (1952). The notion that Ohio could impose capital punishment without providing a meaningful mechanism for clemency -- something that has never been done in our country's history -- surely violates "'principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut*, 302 U.S. at 325, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Yet, this is precisely what the state seeks to do by forcing Woodard to participate in a clemency process that is little more than a "meaningless ritual." *Douglas v. California*, 372 U.S. 353, 358 (1963)(due process requires more than simply allowing defendant to participate in meaningless ritual); *see also Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)(fundamental liberty interest of natural parents in the care, custody, and management of child may not be terminated by state absent compliance with fair procedures).

This Court has stressed that it will exercise utmost care when considering whether to "'break new ground in [the] field' of substantive due process." *Albright v. Oliver*, 510 U.S. 266, 287 (1994)(Souter, J., concurring), quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). However, recognition of the right of death-sentenced individuals to have access to clemency and to receive meaningful consideration of their request is vital if clemency is to continue to fulfill its historical role as a fail safe in our system of capital justice. *Ford v. Wainwright*, 477 U.S. 399 (1986), in which the Court struck down Florida's procedures for pre-

venting the execution of insane individuals, is instructive of why Ohio's procedures for determining whether to remit the death sentence through clemency are constitutionally inadequate:

> In all other proceedings leading to the execution of an accused, we have said that the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976)(plurality opinion). And we have forbidden States to limit the capital defendant's submission of relevant evidence in mitigation of the sentence. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(joint opinion). It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.
>
> Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate.

Id. at 413-14.

By the same reasoning, a state's adoption of a capital clemency procedure that encourages arbitrariness is inconsistent with the heightened concerns for fairness and accuracy which have long characterized this Court's review of the capital punishment process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell, and

Stevens, JJ.)(special concern for fairness and accuracy consequence of knowledge that capital punishment is uniquely irremediable). It would be anomalous to suppose that the state must be scrupulously fair in its procedures for finally determining whether a condemned prisoner is sane, but can nevertheless utilize a wholly capricious procedure when a capital prisoner seeks to avail himself of the "traditional remedy for claims of innocence based on new evidence." *Herrera v. Collins*, 506 U.S. at 417.[15]

[15] The need for judicial guidance in the setting of constitutional procedural standards for capital clemency is also apparent from troubling decisions arising in other jurisdictions. For example, in *Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), the court ultimately upheld Arizona's capital clemency procedure whereby former attorneys for the inmate "switched sides" and prepared briefs, witnesses, and evidence on behalf of the state, opposing the prisoner's request for executive clemency. While terming Arizona's procedure "unfortunate and inexcusable," the court denied the inmate's due process claim, concluding that this clemency process did not "shock the conscience." *Id.* at 404. In *Otey v. Stenberg*, 34 F.3d 635, 639 (8th Cir. 1994), a panel of the Eighth Circuit, by a two-to-one vote, upheld Nebraska's capital clemency process whereby the deciding vote against commutation was cast by the Attorney General who had "acted as the chief prosecuting official in [the] case, and whose assistants represented the state at the clemency proceedings." One jurist was so disturbed by the serious questions about fundamental fairness in capital clemency proceedings raised by *Otey* and similar cases that he was moved to remark, "I am troubled by the state of the law in this field and look forward to possible changes." *Wainwright v. Brownlee*, 103 F.3d 708, 710 (8th Cir. 1997) (Henley, Senior C.J., concurring).

It is evident from these cases, and from Ohio's defense of its clemency procedure as immune from any federal constitutional scrutiny that, absent the promulgation of basic procedural standards by this Court, clemency can no longer be relied on to fulfill its historical role in state schemes of capital punishment.

As this Court has recognized, clemency is no longer an arbitrary act of mercy bestowed on the condemned by a beneficent executive. Justice Holmes, speaking of the president's clemency power, noted that "[a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927); *see also Roberts v. Louisiana*, 428 U.S. 325, 350 (1976)(White, J., dissenting)("The country's experience with the commutation power does not suggest that it is a senseless lottery, that it operates in an arbitrary or discriminatory manner"). The APA cannot arbitrarily prevent Woodard's access to this vital part of the constitutional scheme or deprive him of the thorough investigation and recommendation mandated by Ohio law.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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